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COMMENT

BURDEN OF PROOF IN LAND USE REGULATION: A UNIFIED APPROACH AND APPLICATION TO FLORIDA

CARL J. PECKINPAUGH, JR.

The power to regulate land use is an aspect of the police power reserved to the states.[1] The states, in turn, have generally regarded land use control as a local matter and so have delegated most of their power to regulate land use to local units of government.[2] Because local land use decisions have traditionally been treated by courts as legislative actions, a presumption of validity attaches to such decisions. The party disputing the action must therefore bear the heavy burden of proving a constitutional violation.[3] Thus, the characterization of such decisions as "legislative" raises a formidable obstacle to the challenging landowner.[4] The challenger's heavy burden of proof applies to zoning changes as well as original zoning decisions since changes have similarly been characterized as legislative actions.[5]

Recently, some land use regulation decisions have questioned the continued validity of the traditional characterization of zoning.[6] One primary concern is the relative informality of most land use control decisions, especially in the area of rezoning, which creates opportunities for abuse of authority by decisionmakers. Another concern is that the burden of proof on the party disputing a zoning action is so harsh that effective review is unavailable.[7] To deal with these problems, new rules concerning the burden of proof and presumptions of validity have been developed in the land use regulation area, but the evolution of these new rules has been piecemeal and disorganized.[8] There has been much consequent judicial confusion in this area, as exemplified by a recent, poorly-

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1. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). Land use regulation usually is in the form of zoning at the local level. 1 R. ANDERSON, AMERICAN LAW OF ZONING § 2.01 (2d ed. 1976).

2. R. ANDERSON, *supra* note 1, at § 2.01.

3. Comment, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130, 130-31 (1972).

4. R. FISHMAN, HOUSING FOR ALL UNDER LAW 263-64 (1978).

5. *Id.* at 264-65.

6. Comment, *supra* note 3, at 132.

7. *See* R. FISHMAN, *supra* note 4, at 263-80. *See generally* R. ANDERSON, *supra* note 1, at §§ 3.14-.22.

8. *See, e.g.*, R. ANDERSON, *supra* note 1, at §§ 3.17 & 3.18.

reasoned, Florida appellate decision, *Estuary Properties, Inc. v. Askew.*[9]

The purpose of this comment is to present a unified approach to the problems of burden of proof and the presumption of decisional validity within the context of land use regulation. The traditional view and two of the modern approaches will be examined, and one of them—generally referred to as the *Fasano* approach—will be demonstrated to be the most consistent with general Florida law as it has developed outside the field of land use regulation.

The traditional view of local land use regulation was first described in 1926 by the United States Supreme Court in *Village of Euclid v. Ambler Realty Co.*[10] In that case, the village of Euclid had adopted a comprehensive zoning ordinance under which the entire village was divided into six classes of use districts.[11] The ordinance was attacked by a landowner on the grounds that it deprived him of liberty and property without due process of law, and that it denied him equal protection of law in violation of the fourteenth amendment of the Federal Constitution. In the same respects it was claimed to offend the Ohio Constitution.[12] The alleged harm was that the zoning prevented the landowner from fully utilizing his property. In upholding the constitutionality of the ordinance, the Court stated that:

> If the validity of the legislative classification for zoning purposes be *fairly debatable,* the legislative judgment must be allowed to control.
>
> . . . .
>
> . . . [I]t must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.[13]

This "fairly debatable" test became the standard for judicial review of most local land use decisions.[14]

The first attempt by some state courts to ameliorate the effect of

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9. 381 So. 2d 1126 (Fla. 1st Dist. Ct. App. 1979), *set for oral argument,* No. 58,485 (Fla., May 2, 1980).

10. 272 U.S. 365 (1926). For a discussion of the holding in *Euclid,* see discussion in Bronstein & Erickson, *Zoning Amendments in Michigan—Two Recent Developments,* 50 J. URBAN L. 729, 733 (1973) and R. ANDERSON, *supra* note 1, at § 3.09.

11. 272 U.S. at 379-80.

12. *Id.* at 384.

13. *Id.* at 388, 395 (citations omitted) (emphasis added).

14. R. FISHMAN, *supra* note 4, at 42.

the test's extreme deference to legislative judgments was the adoption of a shifting burden of proof. Professor McCormick has stated that a burden of proof actually consists of two separate burdens.[15] The first is the burden of going forward with the evidence; that is, the burden "of producing evidence, satisfactory to the judge, of a particular fact in issue. The second is the burden of persuading the trier of fact that the alleged fact is true."[16] In most situations, the burden of producing evidence and the burden of persuasion are placed on the party who "seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion."[17] Failure to meet the first burden, that of producing evidence, exposes a party to an adverse ruling.[18] If a party meets the burden of producing evidence, however, the burden of producing counter-evidence may shift to the adverse party.[19] The second burden, the burden of persuasion, does not shift, and it becomes important only after all the evidence has been presented. After the presentation of all the evidence, if the trier of fact has not been convinced by the party upon whom the burden of persuasion has been placed, that party will have failed to satisfy its burden and will lose.[20]

In *Board of Supervisors v. Snell Construction Corp.*,[21] the Virginia Supreme Court adopted a shifting-burden-of-proof approach to local land use regulation. The court still recognized zoning as legislative activity, presumed to be valid so long as not unreasonable or arbitrary, but it held that once evidence of unreasonableness is presented by the landowner, the zoning authority must produce its own evidence of reasonableness. If the issue is thereby rendered "fairly debatable," the zoning ordinance stands; if not, the presumption of legislative validity is defeated and the ordinance must be stricken.[22] In *Snell*, the trial court struck a rezoning of twenty-six acres which the County Board of Supervisors had changed from the high density authorized by the previous board to a medium density development.[23] The Virginia Supreme Court affirmed,

15. E. CLEARY, MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 336 (2d ed. 1972).
16. *Id.* (footnotes omitted).
17. *Id.* at § 337.
18. *Id.* at § 336.
19. *Id.*
20. *Id.*
21. 202 S.E.2d 889, 892-93 (Va. 1974) (citing Board of Supervisors v. Carper, 107 S.E.2d 390, 395 (Va. 1959)).
22. *Id.* at 893.
23. *Id.* at 891-92.

holding that the evidence (presented by the county upon the landowner's motion for declaratory judgment) was insufficient even to make the rezoning action fairly debatable.[24] In short, the county did not meet its burden of producing evidence. The purpose of the shifting-burden-of-proof approach is to promote stability and predictability in the zoning process, according the the Virginia Supreme Court, which stated the rule as follows:

> [W]hen an aggrieved landowner makes a *prima facie* showing that since enactment of the prior ordinance there has been no change in circumstances substantially affecting the public health, safety, or welfare, the burden of going forward with evidence of such mistake, fraud, or changed circumstances shifts to the governing body. If the governing body produces evidence sufficient to make reasonableness fairly debatable, the ordinance must be sustained. If not, the ordinance is unreasonable and void.[25]

Snell was a down-zoning case,[26] but its rationale is equally applicable to zoning actions which could increase the allowable uses of property as illustrated by *DeKalb County v. Flynn*,[27] in which the Georgia Supreme Court adopted a shifting-burden approach. In *Flynn*, a landowner attempted to persuade the County Board of Commissioners to rezone 11.2 acres from single family residential to office and distribution zoning.[28] The court stated that "[t]he Board's zoning enjoys an initial presumption of validity, which the property owner must overcome by showing that the zoning is significantly detrimental to him and insubstantially related to governing public interests."[29] Once the landowner meets its burden of

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24. *Id.* at 893-94.

25. *Id.* at 893 (footnote omitted).

26. *Id.* In general, "rezoning" is "a change in existing zoning rules and regulations within a district, subdivision or other comparatively large area in a given governmental unit." Troup v. Bird, 53 So. 2d 717, 720 (Fla. 1951). A change in zoning may result in more restrictions on use of the land, generally called "down-zoning." *See, e.g., Snell*, 202 S.E.2d at 893. A zoning change resulting in less restrictions on use is called "up-zoning." *See, e.g.*, Fasano v. Board of County Comm'rs, 507 P.2d 23 (Or. 1973). *See also* R. FISHMAN, *supra* note 4, at 363-65. Since the term "rezoning" generally contemplates that the area has been previously zoned, Durocher v. King County, 492 P.2d 547 (Wash. 1972), technically the term "down-zoning" might not be applicable in an initial zoning of land. Note, however, that the *initial* zoning of any unit of land has the effect of a down-zoning since no zoning is always less restrictive than any zoning classification. *See generally* Williamson, *Constitutional and Judicial Limitations on the Community's Power to Downzone*, 12 URB. LAW. 157 (1980).

27. 256 S.E.2d 362 (Ga. 1979).

28. *Id.* at 363.

29. *Id.*

producing evidence, the burden of producing counter-evidence then shifts to the zoning body which must justify the zoning action.[30] The test for reasonableness then calls for balancing the landowner's interests against the public interest. The zoning agency must show reasonableness "by 'clearly more than "any" evidence' " or suffer the risk of nonpersuasion.[31]

As seen from the *Flynn* case, this shifting-burden approach can be applied when the landowner disputes an existing zoning regulation as well as when the zoning body attempts to down-zone property as in *Snell.*

A considerably more convoluted approach to shifting the burden of proof was formulated by the New York Court of Appeals in *Fulling v. Palumbo.*[32] Under the New York scheme, a zoning ordinance may be challenged by a showing that the landowner will suffer a significant financial loss.[33] The zoning body must then show that some legitimate public interest—health, safety, or welfare—will be served by the restriction. Such a showing by the zoning body shifts the burden back to the property owner, who must "demonstrate that the hardship caused is such as to deprive him of any use of the property to which it is reasonably adapted, and that, as a result, the ordinance amounts to a taking of his property."[34] Although more recent New York opinions still cite *Fulling,* the complex pattern of shifting burdens of proof does not appear in them.[35]

The shifting-burden approach has been criticized, especially when applied to zoning changes initiated by the zoning body, as possibly preventing the government from easily updating obsolete zoning plans.[36] As a practical matter, however, even after the burden of proof has shifted to the government, the government might have little trouble supporting any but the worst zoning decisions, because sufficient evidence to make the issue of reasonableness fairly debatable satisfies the *Euclid* test.[37] It would be very difficult for courts to develop the shifting-burden approach so as to steer between these two problems. In any case, other state courts have

30. *Id.*
31. *Id.* (quoting Barrett v. Hamby, 219 S.E.2d 399 (Ga. 1975).
32. 286 N.Y.S.2d 249 (N.Y. 1967).
33. *Id.* at 252.
34. *Id.* at 253 (citation omitted).
35. R. ANDERSON, *supra* note 1, at § 3.17.
36. 24 CATH. U.L. REV. 294, 303 (1975).
37. *Id.* at 308.

developed another approach which is both easier to apply and more valid theoretically.

The better approach distinguishes between legislative functions and judicial or quasi-judicial functions of zoning bodies.[38] This fundamental departure from the traditional view allows the courts to take a more active role in reviewing the decisions. Under such a functional analysis, enactment of a comprehensive zoning ordinance or land use plan would be considered legislative in nature, while zoning or rezoning of relatively small, specific land areas would be characterized as judicial or quasi-judicial actions.[39] The distinction between the two can be described as follows:

> First, judicial action is narrow in scope, focusing on specific individuals or on specific situations, while legislative action is open-ended, affecting a broad class of individuals or situations. . . .
>
> Secondly, legislative action results in the *formulation* of a general rule or policy, while judicial action results in the *application* of a general rule or policy. . . .
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> Thirdly, it is generally stated that judicial action is retrospective, determining '[t]he rights and duties of parties under existing law and with relation to existing facts . . . .' By contrast, legislative action is said to be prospective, determining '[w]hat the law shall be in future cases'. . . .
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> Lastly, it has been held that the test for judicial action is whether it is the result of judgment or discretion. . . .[40]

Actions characterized as "legislative" would still be entitled to the traditional strong presumption of validity.[41] Accordingly, parties challenging legislative actions would have the burden of proving that the actions were arbitrary and capricious or confiscatory. On the other hand, actions characterized as quasi-judicial would be subject to additional due process requirements, including "the requirement that the decision be supported by findings which detail not only the unstated land use policies but also the evidence which supports either a finding of these policies' applicability or non-applicability."[42] The challenging party must still meet its burden of proof, described hereafter, but that burden is less difficult to meet than proving an action to be unconstitutionally arbitrary and

38. *See generally* Comment, *supra* note 3.
39. *Id.* at 136-37.
40. *Id.* at 134-36 (citations omitted) (emphasis in original).
41. *See* Parkridge v. City of Seattle, 573 P.2d 359, 363 (Wash. 1978).
42. Comment, *supra* note 3, at 139.

capricious.

The newer functional dichotomy was applied in *Fasano v. Board of County Commissioners.*[43] In *Fasano,* the Board of County Commissioners had rezoned thirty-two acres of land from a single-family-residential classification to a planned-residential classification, which permitted construction of a mobile home park, at the corporate landowner's request. Homeowners from areas adjacent to the rezoned land unsuccessfully opposed the rezoning and sued to disallow the zone change.[44] The Commissioners contended that review of the rezoning was limited to a determination of whether the change was arbitrary and capricious.[45]

The Oregon Supreme Court rejected this contention and found that the state legislature had "conditioned the county's power to zone" upon the requirement that the zoning be for the general welfare of the community and that certain enumerated factors be considered in a comprehensive county land use plan.[46] In setting aside the Commissioners' rezoning, the court held that the action was judicial in nature because it encompassed only a small area of land. The burden of proof must be imposed on the party seeking the change—in this instance, the corporate landowner—and the court held that the burden of proof had not been met.[47]

The *Fasano* court stated that the necessary proof to support the zoning change would be that "the change is in conformance with the comprehensive plan."[48] The court also stated that "[t]he more drastic the [zoning] change, the greater will be the burden."[49] At a minimum, a showing that there is a *public need* for the change, and that the need would best be satisfied by the change, is required.[50] Mistake in the original plan or ordinance, or changed

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43. 507 P.2d 23 (Or. 1973).

44. *Id.* at 25.

45. *Id.* at 27.

46. *Id.* at 28. The factors included:

> The various characteristics of the various areas in the county, the suitability of the areas for particular land uses and improvements, the land uses and improvements in the areas, trends in land improvement, density of development, property values, the needs of economic enterprises in the future development of the areas, needed access to particular sites in the areas, natural resources of the county and prospective needs for development thereof, and the public need for healthful, safe, aesthetic surroundings and conditions.

Id. at 27-28 (quoting 1963 Or. Laws ch. 619, § 4 (repealed 1977)).

47. 507 P.2d at 29.

48. *Id.* at 28.

49. *Id.* at 29.

50. *Id.*

physical characteristics of the area, might be relevant factors in meeting this burden in a particular case, although neither would be a requisite.[51] The court characterized the burden of proof to be the same as the one required in judicial proceedings. It found that the conclusionary, superficial staff report relied on by the Commissioners to support the rezoning was insufficient to meet this burden.[52]

The *Fasano* approach has been followed by the supreme courts of Washington,[53] Colorado,[54] Montana,[55] Nevada,[56] and Kansas.[57] All of these courts emphasized the importance of guidelines (usually legislative) for the exercise of quasi-judicial decisionmaking by local zoning bodies and to guide judicial review of that decisionmaking.[58] The courts also stressed the requirement that the local zoning decisions be supported by evidence contained in a verbatim record.[59] Thus, in these cases, the judicial review of the local decision was not limited to the constitutional "fairly debatable" test of whether the action was arbitrary and capricious or confiscatory of the landowner's property; instead, the review was similar to review of a lower court holding.[60] The use of this scheme is unaffected whether the zoning body,[61] the landowner,[62] or other affected parties with standing[63] institutes the zoning action.

The importance of legislative guidelines for local zoning actions serves to distinguish this new approach from the traditional approach.[64] Essentially, guidelines serve to limit the discretion of the zoning authority. Zoning actions not only must bear the traditional

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51. *Id.*

52. *Id.* at 29-30.

53. Parkridge v. City of Seattle, 573 P.2d 359 (Wash. 1978); Fleming v. City of Tacoma, 502 P.2d 327 (Wash. 1972).

54. Snyder v. City of Lakewood, 542 P.2d 371 (Colo. 1975).

55. Lowe v. City of Missoula, 525 P.2d 551 (Mont. 1974).

56. Forman v. Eagle Thrifty Drugs & Markets, Inc., 516 P.2d 1234 (Nev. 1974).

57. Golden v. City of Overland Park, 584 P.2d 130 (Kan. 1978).

58. *See, e.g.*, Lowe v. City of Missoula, 525 P.2d 551, 554 (Mont. 1974); Forman v. Eagle Thrifty Drugs & Markets, Inc., 516 P.2d 1234, 1237-38 (Nev. 1974).

59. *See, e.g.*, Parkridge v. City of Seattle, 573 P.2d 359, 365 (Wash. 1978).

60. 507 P.2d at 29.

61. *See* Parkridge v. City of Seattle, 573 P.2d 359, 361-62 (Wash. 1978); Lowe v. City of Missoula, 525 P.2d 551, 551 (Mont. 1974).

62. *See* Golden v. City of Overland Park, 584 P.2d 130, 132 (Kan. 1978).

63. *See* Snyder v. City of Lakewood, 542 P.2d 371, 372-73 (Colo. 1975); Fleming v. City of Tacoma, 502 P.2d 327, 328 (Wash. 1972).

64. These guidelines are also central to the constitutional restriction on the delegation of power to zone from the state to local government. This "nondelegation doctrine" is intended to prevent the delegation of unbridled discretion. *See generally* Note, *Florida's Adherence to the Doctrine of Nondelegation of Legislative Power*, 7 FLA. ST. U.L. REV. 541 (1979).

"substantial relation to the public health, safety, morals, or general welfare,"[65] but also must meet the standards set by the legislature. Further, the local action will be reversed unless evidence in the record shows that the guidelines were met.[66]

These guidelines are usually found in the statutory grant of zoning authority to the local government. For instance, the Montana statute requires that the land use regulations be adopted in accordance with a comprehensive plan and be designed to lessen traffic congestion, to secure safety from fire and other disasters, to prevent overcrowding, to "facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements," and with a "view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality."[67] On judicial review of a local decision, the Montana guidelines also provide the reviewing court with more specific guidance to determine whether a zoning action is proper than does the simple requirement that a zoning action be for the health, safety, or welfare of the public.

On the other hand, despite Washington's adoption of the *Fasano* functional dichotomy for zoning actions, together with the associated requirement that proof be discernible to a reviewing court on a verbatim record, the traditional requirement that actions be for the health, safety, or welfare of the public continues to be the sole guideline.[68] On review, the local decision in Washington will only be overturned if shown to be arbitrary and capricious.[69] Although the local quasi-judicial decision is no longer presumptively valid in Washington, the challenger still has nearly as difficult a burden as he would have had under the traditional approach.[70]

The *Fasano* approach has generally received favorable response from the commentators[71] and is seen as a major step toward secur-

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65. 272 U.S. at 395.

66. *E.g., Fasano*, 507 P.2d at 30.

67. MONT. REV. CODES ANN. § 11-2703 (1947). *See also* NEV. REV. STAT. §§ 278.150-.310 (1979); COLO. REV. STAT. §§ 31-23-201 to -209 (1973).

68. Parkridge v. City of Seattle, 573 P.2d 359, 363 (Wash. 1978).

69. *Id.*

70. In order to avoid the same problem, the Kansas Supreme Court has judicially enumerated guidelines for zoning actions and their review that are considerably more detailed than the arbitrary and capricious standard. Golden v. City of Overland Park, 584 P.2d 130, 136-37 (Kan. 1978).

71. 24 CATH. U.L. REV., *supra* note 36, at 311-12. *See also* Booth, *A Realistic Reexamination of Rezoning Procedure: The Complementary Requirements of Due Process and Judicial Review*, 10 GA. L. REV. 753 (1976); Bross, *Circling the Squares of Euclidean Zoning: Zoning Predestination and Planning Free Will*, 6 ENVT'L L. 97 (1975); Sullivan, *Araby Re-*

ing procedural due process for persons affected by decisions of local zoning bodies.[72] There is the possibility, however, that this approach could result in frequent substitution of the reviewing court's judgment for that of the zoning body, resulting in fragmentation of policymaking.[73] Also, some zoning decisions are difficult to characterize as distinctly legislative or quasi-judicaial.[74]

In Florida, there are several statutes which provide legislative guidelines under which local governments exercise delegated power over land use. These could form the basis for adoption of the *Fasano* approach. The two most important are: (1) the Florida Environmental Land and Water Management Act of 1972,[75] and (2) the Local Government Comprehensive Planning Act of 1975 (LGCPA).[76] The Florida Environmental Land and Water Management Act of 1972 contains provisions related to areas of critical state concern[77] and developments of regional impact.[78] The LGCPA requires that local governments[79] plan for future development, adopt comprehensive plans to guide this development, and enact land development regulations to implement the comprehensive plans.[80]

Prior to the enactment of the LGCPA, there was considerable confusion about the power of local governments in Florida to adopt zoning regulations.[81] Florida did not adopt a general zoning enabling act for cities until 1939, or one for counties until 1969, although individual cities and counties had been granted power to

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visited: The Evolving Concept of Procedural Due Process Before Land Use Regulatory Bodies, 15 SANTA CLARA LAW. 50 (1974).

72. Booth, *supra* note 71, at 766-79; Sullivan, *supra* note 71, at 68-71.

73. 24 CATH. U.L. REV., *supra* note 36, at 311.

74. Bross, *supra* note 71, at 112-13 (pointing out the fluid nature of the terms quasi-legislative and quasi-judicial).

75. FLA. STAT. ch. 380 (1979).

76. *Id.* §§ 163.3161-.3211.

77. *Id.* § 38.05. For a discussion of the procedure for designation of areas of critical state concern, see Note, *supra* 64, at 549-51.

78. FLA. STAT. § 380.06 (1979).

79. " 'Local government' means any county or municipality or any special district or local governmental entity established pursuant to law which exercises regulatory authority over, and grants development permits for, land development." *Id.* § 163.3164 (11). " 'Development permit' includes any building permit, zoning permit, subdivision approval, rezoning, certification, special exception, variance, or any other official action of local government having the effect of permitting the development of land." *Id.* § 163.3164(6).

80. *Id.* § 163.3167(1).

81. See the discussion of the historical development of zoning in Florida contained in J. JUERGENSMEYER & J. WADLEY, ZONING ATTACKS & DEFENSES: THE LAW IN FLORIDA §§ 1-5 to 1-7 (1980); O'Connell, *Whatever Happened to "Zoning" or What You Need to Know About "The Local Planning Act" But Don't Know What to Ask!*, 50 FLA. B.J. 46 (1976).

zone land through special acts of the legislature.[82]

The major reason for the confusion about the powers of local governments over land use was the number of inconsistent "sources" of those powers which could be identified. These sources included the broad "home rule"[83] provisions contained in the Florida Constitution as ratified in 1968,[84] the statutes which enumerate county powers and duties,[85] the Municipal Home Rule Powers Act,[86] the county and municipal planning for future development statutes,[87] and finally the LGCPA. In particular, the permissive nature of several of these sources led to debate over whether a local governmental body exercising zoning power pursuant to one "source" would be restricted by the limitations expressed in another "source."

Almost all of this confusion was eliminated by the enactment of the LGCPA, however.[88] Each of the other "sources" of the zoning powers contains language to the effect that the powers could not be exercised inconsistently with a general law. The LGCPA, a general law, also provides that:

> Where this act may be in conflict with any other provision or provisions of law relating to local governments having authority to regulate the development of land, the provisions of this act shall govern unless the provisions of this act are met or exceeded by other provision or provisions of law relating to local government.[89]

Therefore, the only remaining doubt about which statutes govern local land use control in Florida concerns the extent to which provision in other "sources" involve matters not governed by the LGCPA or are more rigorous than those in the LGCPA.[90] This is-

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82. O'Connell, *supra* note 81, at 46.

83. "Home rule" is the concept that local governments should be granted almost total control of local matters. Sparkman, *The History and Status of Local Government Powers in Florida*, 25 U. FLA. L. REV. 271, 285-88 (1973).

84. The most important home rule provisions are in FLA. CONST. art. VIII, §§ 1(f), (g), 2(b). Sparkman, *supra* note 83, at 289-90.

85. FLA. STAT. § 125.01(1)(g), (h) (1979).

86. *Id.* §§ 166.011-.042.

87. *Id.* §§ 163.160-.315.

88. Martin, *Comprehensive Planning by Local Governments in Florida: A Problem of Inconsistency*, 53 FLA. B.J. 173 (1979); O'Connell, *supra* note 81, at 47.

89. FLA. STAT. § 163.3211 (1979).

90. It has been stated that the legislature should complete the job it began with the LGCPA by repealing the statutes which were rendered superfluous by it, in which event other provisions not inconsistent with the LGCPA could be retained. Martin, *supra* note 88,

sue does not seem to be a major problem since the new mandatory requirements of the LGCPA are very complete.

Substantively, the LGCPA requires that each local government adopt a comprehensive plan "for the orderly and balanced future economic, social, physical, environmental, and fiscal development of the area."[91] The plan must consist of a number of required elements.[92] The required elements would encompass a future land use plan, traffic circulation, general waste and potable water, conservation, recreation and open space, housing, coastal zone protection if the governmental unit lies in the coastal zone, intergovernmental coordination, and utilities.[93] In addition, a local governmental unit may adopt any of a number of optional elements.[94] There are detailed statutory criteria dealing with the form and content of each of these elements. Additionally, a lengthy procedure for approval of the plans is set out to assure their quality.[95] Public participation in the process is required,[96] including public hearings after due notice, the records of which are to be open to the public.[97] Further, the plans of adjacent local governments must be coordinated.[98]

After the comprehensive plan is completed, all land development regulations enacted or amended must be consistent with the comprehensive plan.[99] When judicial review is sought of any local governmental development regulations, according to the LGCPA, the comprehensive plan may serve as a guide to the court.[100]

The LGCPA was enacted, in part, in furtherance of the Florida Land and Water Management Act of 1972.[101] That enactment also contained guidelines on the exercise of land use regulations by local governments. The procedure for designation of developments of regional impact, contained in the Florida Environmental Land and Water Management Act of 1972, provides a system whereby devel-

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at 174. This would certainly make the statutes easier to understand for anyone who has not studied them in detail.

91. FLA. STAT. § 163.3177(1) (1979).

92. *Id.* § 163.3177(6).

93. *Id.*

94. *Id.* § 163.3177(7).

95. *Id.* § 163.3184.

96. *Id.* § 163.3181.

97. *Id.* § 163.3174.

98. *Id.* § 163.3177(4).

99. *Id.* §§ 163.3194(1), .3201. Note that this requirement that land use regulations conform to the comprehensive plan is itself an important aspect of the *Fasano* approach. *See* note 48 and accompanying text *supra*.

100. *Id.* § 163.3194(3)(a).

101. *Id.* § 163.3161(2).

opments which would substantially impact upon more than one county are subject to special permit requirements to insure that the *regional* effects of these larger developments are considered before construction takes place.[102] In determining whether to approve a development of regional impact, the local government must consider the extent to which the development (1) complies with an adopted state land development plan,[103] (2) is consistent with local land development regulations, and (3) is consistent with the report and recommendations of the regional planning agency.[104] In preparing its report and recommendations, the regional planning agency must consider the extent to which the development affects (1) the environment and natural resources, (2) the regional economy, (3) the water, sewer, solid waste disposal or other necessary public facilities, (4) the public transportation facilities, (5) the ability of the public to find adequate housing accessible to their employment, (6) the energy consumption, and (7) other criteria deemed important by the regional planning agency.[105] The statutory process also requires that prior to a decision regarding such a development, public hearings be held after due notice and that a record of the proceedings be kept.[106]

A requirement that local governments' land use decisions comport with these guidelines, as embodied in the *Fasano* approach, would be more consistent with Florida's rigorous approach to the delegation of legislative power than is the present deference to local decisionmaking.[107] Adoption of the *Fasano* approach would, however, require judicial recognition that the local decision-making power is a *state* power in the first instance and that it has merely been delegated to the local governments.

There was just such a judicial recognition of that principle underlying the decision in *Askew v. Cross Key Waterways.*[108] In *Cross Key Waterways,* the Florida Supreme Court struck the process used by the Administration Commission to designate areas of critical state concern as an unconstitutional delegation of legislative power.[109] Under the challanged scheme the Administration

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102. *See* note 113 *infra.*

103. *See* The Florida State Comprehensive Planning Act of 1972, FLA. STAT. §§ 23.0111-.0115 (1979).

104. FLA. STAT. § 380.06(11) (1979).

105. *Id.* § 380.06(8).

106. *Id.* § 380.06(7).

107. *See generally* Note, *supra* note 64.

108. 372 So. 2d 913 (Fla. 1978).

109. *Id.* at 925.

Commission, a state agency composed of the Governor and the Cabinet, had been delegated some of the powers to regulate land use which were previously delegated to local governments by the legislature.[110] The First District Court of Appeal had expressed concern that such a redelegation of that power was offensive to the tradition of local land use regulation, but it nevertheless recognized the legality of the redelegation, provided that it be accompanied by sufficient standards to satisfy the Florida nondelegation doctrine.[111]

When making land regulation decisions, local governments are exercising powers delegated from the state pursuant to statutes containing specific guidelines. Therefore, the *Fasano* requirement that the guidelines must be followed and promoted by local decisions, and that this be evident from the record, make perfect sense. Otherwise, the guidelines would be meaningless from their inception.

A recent Florida appellate court decision, *Estuary Properties*, regarding a development of regional impact, appears to have been a judicial attempt to ameliorate the traditional heavy burden of proof on landowners who contest local land use regulations. Estuary Properties, Inc. (Estuary) acquired 6,500 acres of land bordering state-owned lands in Lee County.[112] Estuary applied to the Lee County Board of County Commissioners for approval of a development of regional impact[113] and for a zoning change to allow increased density of the development so that Estuary could ultimately construct 26,500 residential units on the property.[114] The Lee County Board of County Commissioners denied the application, and the Florida Land and Water Adjudicatory Commission[115]

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110. Cross Key Waterways v. Askew, 351 So. 2d 1062, 1065 (Fla. 1st Dist. Ct. App. 1977), *aff'd*, 372 So. 2d 913 (Fla. 1978).

111. *Id.*

112. 381 So. 2d at 1128.

113. Under FLA. STAT. § 380.06(1) (1979), " 'Development of regional impact,' . . . means any development which, because of its character, magnitude, or location, would have a substantial effect upon the health, safety, or welfare of citizens of more than one county." Developments of regional impact are subject to special permitting by the local government, after hearings and recommendations by a regional planning authority, in an attempt to insure that the regional effects of these larger developments, beyond the local jurisdictions in which they are situated, are considered before construction takes place. Pelham, *Regulating Developments of Regional Impact: Florida and the Model Code*, 29 U. Fla. L. Rev. 789 (1977). This provision was based upon the ALI, MODEL LAND DEVELOPMENT CODE (1975). Pelham, *supra*, at 791. For a comprehensive discussion, see T. PELHAM, STATEWIDE LAND-USE PLANNING AND REGULATION (1979).

114. 381 So. 2d at 1128.

115. Composed of the Governor and the Cabinet. *See* FLA. STAT. §§ 14.202, 380.07(1)

denied Estuary's appeal.[116]

The First District Court of Appeal reversed the Adjudicatory Commission and Lee County, directing that within thirty days Lee County should either grant Estuary's application to develop the land as it wished to, or institute condemnation proceedings to acquire Estuary's land.[117] The court found that the agencies had implicitly assigned to Estuary the burden of proving that the development plan would not result in ecological change and pollution of the adjacent bay.[118] It also found that since the legislative intent behind the development of regional impact statutes was to balance environmental protection and economic development, assignment of the burden of proof to the developer was contrary to the statute and constituted a denial of due process and a taking of property without just compensation.[119] To reach this result, the court cited the case of *Zabel v. Pinellas County Water & Navigation Control Authority*,[120] for the proposition that a landowner cannot be required to carry the burden of proof in obtaining permits to develop his property.[121]

Unfortunately, the court misconstrued the *Zabel* case. In *Zabel*, appellants' predecessors in title received 11.5 acres of submerged coastal land in Pinellas County from the Florida Board of Trustees of the Internal Improvement Trust Fund (BTIITF).[122] Appellants requested that the Pinellas County Water and Nagivation Control Authority[123] fix a bulkhead line and grant a dredge and fill permit for the land.[124] The Authority denied appellants' application and the circuit court and district court of appeal affirmed.[125] The Florida Supreme Court held that the transfer of the submerged land

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(1979). See text accompanying notes 145-49 *infra*, for a discussion of appeal of a local order to the Adjudicatory Commission.

116. 381 So. 2d at 1131.

117. *Id.* See Ed Zaagman, Inc. v. City of Kentwood, 277 N.W. 2d 475, 482-91 (Mich. 1979) for an excellent discussion on a court's options once an ordinance is judicially declared invalid.

118. 381 So. 2d at 1135.

119. *Id.* at 1132-41.

120. 171 So. 2d 376 (Fla. 1965).

121. 381 So. 2d at 1136.

122. 171 So. 2d at 379. The Board of Trustees of the Internal Improvement Trust Fund consists of the Governor and the Cabinet and it holds title to and is vested with authority to control state-owned lands. FLA. STAT. § 253.02(1) (1979).

123. The Pinellas County Water and Navigation Control Authority was a local board with authority over bulkhead lines and dredge and fill of submerged land. *See* ch. 57-362, §§ 2, 4, 1957 Fla. Laws 806 (repealed 1975).

124. 171 So. 2d at 377.

125. *Id.* at 377-78.

carried with it a presumptively valid determination that the public interest would not be impaired by bulkhead and fill of the land.[126]

The *Zabel* decision was based upon a statute which provided that transferees of submerged lands sold by the BTIITF would have the right to bulkhead and fill the land.[127] Therefore, the court held that the burden of proof should be on the party assailing the validity of the right to bulkhead and fill derived from the sale by the BTIITF.[128] In *Zabel*, that party was the local Water and Navigation Authority. Before *Zabel* can be applicable at all, however, the land at issue must have been transferred to the landowner from the state pursuant to the statutes discussed in *Zabel*.[129] Otherwise, Florida case law has established that the burden of proof in dredge and fill cases is upon the landowner to show that the permit sought would be in the public interest.[130] There was no finding in *Estuary Properties* that the land had been transferred from the state pursuant to these statutes. Therefore, the court could not properly conclude that Estuary had a presumptively valid right to dredge and fill based upon the *Zabel* rationale. In addition, *Zabel* only involved certain dredge and fill permits and was not applicable at all to the zoning issues of the *Estuary Properties* case.

The court's reliance on *Zabel* in *Estuary Properties* may have stemmed from a belief that a landowner should not be required to bear the traditional heavy burden of proof in challenging local land use regulation decisions. Florida courts have not adopted either the shifting-burden or the *Fasano* approach to this area of law.[131] According to the interpretation of at least one lower court,[132] the Florida Supreme Court did use language in one case[133] which was suggestive of a shifting-burden-of-proof analysis. The supreme court subsequently made it clear, however, that the burden of proving that a zoning ordinance is confiscatory was to remain on

126. *Id.* at 380.

127. Ch. 6451, § 5, 1913 Fla. Laws 122 (repealed 1957).

128. 171 So. 2d at 379-80. *See also* Askew v. Gables-by-the-Sea, Inc., 333 So. 2d 56 (Fla. 1st Dist. Ct. App. 1976) (Court ordered BTIITF to institute condemnation proceedings against plaintiff's submerged land previously purchased from the BTIITF since the BTIITF's refusal to allow plaintiff to dredge and fill the land constituted a permanent denial of use of the land.).

129. *See* 171 So. 2d at 379-80.

130. Yonge v. Askew, 293 So. 2d 395, 401 (Fla. 1st Dist. Ct. App. 1974).

131. *See* Dade County v. Yumbo, 348 So. 2d 392 (Fla. 3d Dist. Ct. App. 1977); Rural New Town, Inc. v. Palm Beach County, 315 So. 2d 478 (Fla. 4th Dist. Ct. App. 1975).

132. Lawley v. Town of Golfview, 174 So. 2d 767 (Fla. 2d Dist. Ct. App. 1965).

133. Burritt v. Harris, 172 So. 2d 820 (Fla. 1965).

the challenging landowner.[134] In dictum, one Florida court indicated that when an applicant for a special exception under a zoning code meets the conditions set out in the code, the burden of proof would be upon the "zoning authority to demonstrate by competent substantial evidence that the special exception is adverse to the public interest."[135] That decision, however, is not applicable to the usual zoning situation.

Florida courts have recognized a distinction between local land use regulation decisions which are legislative and those which are quasi-judicial.[136] This distinction is important for determining the procedure to be followed for obtaining judicial review of a local land use regulation decision.[137] Normally, quasi-judicial land use decisions by local governments will be judicially reviewable by way of common law writ of certiorari to the circuit court.[138] The writ of certiorari is not available for review of legislative action such as a direct attack against the facial validity of an ordinance.[139] Rather, an attack on legislative action should take the form of an original court proceeding in equity.[140]

The mechanism for judicial review may be altered by statute. The only extant statutory provisions for judicial review of local land use decisions appear in the county and municipal planning for future development statutes[141] and the Florida Land and Water Management Act of 1972.[142] The first of these provides that decisions of a board of adjustment[143] may be reviewed in the circuit

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134. City of St. Petersburg v. Aikin, 217 So. 2d 315 (Fla. 1968).

135. Rural New Town, Inc. v. Palm Beach County, 315 So. 2d 478, 480 (Fla. 4th Dist. Ct. App. 1975).

136. *See generally* L. DAVIDSON & M. MACCONNELL, FLORIDA REAL PROPERTY PRACTICE SERVICE: FLORIDA ZONING LAW § 5.03 (1980).

137. *Id.*

138. Sun Ray Homes, Inc. v. County of Dade, 166 So. 2d 827 (Fla. 3d Dist. Ct. App. 1964).

139. G-W Dev. Corp. v. Village of North Palm Beach Zoning Bd. of Adjustment, 317 So. 2d 828, 831 (Fla. 4th Dist. Ct. App. 1975). Note also City of Tallahassee v. Poole, 294 So. 2d 52 (Fla. 1st Dist. Ct. App. 1974), in which it was held that an equitable proceeding was properly instituted by landowners who were denied rezoning of 71 acres. Although rezoning is usually considered quasi-judicial, the size of this area would make the action legislative in nature. *See* notes 32 & 33 and accompanying text *supra*.

140. Thompson v. City of Miami, 167 So. 2d 841 (Fla. 1964); L. DAVIDSON, *supra* note 136, at § 5.03(A).

141. FLA. STAT. §§ 163.160-.315 (1979).

142. *Id.* ch. 380.

143. The board of adjustment is created as part of the local zoning ordinances, FLA. STAT. § 163.220 (1979), to hear and decide appeals from orders or determinations made by a local administrative officer in the enforcement of a zoning ordinance or regulation and to hear and decide "such special exceptions as the board of adjustment is specifically author-

court either by a trial de novo or by petition for writ of certiorari, at the election of the appellant.[144] The Florida Land and Water Management Act of 1972 provides that development orders issued by local government in regard to a development of regional impact may be appealed to the Adjudicatory Commission within forty-five days of the order's rendition.[145] The Adjudicatory Commission must hold a hearing pursuant to Florida's Administrative Procedure Act[146] and must issue an order granting or denying the right to develop, although it may attach conditions or restrictions to its order.[147] Review of the Adjudicatory Commission's order may be sought by way of petition to the district court of appeal.[148] When a development of regional impact is involved, this is the only means available for judicial review even though there may be a simple zoning issue involved as well.[149] Regardless of the format of judicial review of the local land use regulation decisions, the traditional heavy burden of proof remains upon the landowner.

Review of the *Estuary Properties* decision has been sought by writ of certiorari in the Florida Supreme Court.[150] This case could provide a good opportunity for the Florida Supreme Court to adopt a modern model of local land use regulation. The court could even take a new step toward a unified approach in this area based upon Florida case law from outside the area of land use regulation.

Florida courts have already demonstrated a predisposition toward a modern view of burden of proof in land use regulation. Of the two major approaches used to ameliorate the traditional rules on burden of proof in this area, the *Fasano* approach, with its emphasis upon statutory guidelines, should be adopted in Florida because it provides greater procedural and substantive protection for

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ized to pass on under the terms of the zoning ordinance." *Id.* § 163.225(2)(a).

144. FLA. STAT. § 163.250 (1979). *See* Bell v. City of Sarasota, 371 So. 2d 525 (Fla. 2d Dist. Ct. App. 1979).

145. FLA. STAT. § 380.07(2) (1979).

146. *Id.* ch. 120.

147. *Id.* § 380.07(3)-(4).

148. *See* 381 So. 2d at 1128.

149. General Elec. Credit Corp. v. Metropolitan Dade County, 346 So. 2d 1049, 1054 (Fla. 3d Dist. Ct. App. 1977). The Oregon Legislature, in comparison, has recently taken the novel step of establishing a Land Use Board of Appeals, a state agency with an appointed membership, to which all land use decisions are appealed. Ch. 772, §§ 2, 4, 1979 Or. Laws, reprinted as a note to OR. REV. STAT. ch. 197 (1979). Appeal from a final order of the Board is available in the Court of Appeal. *Id.* § 6a. "Land use decisions" is defined to include substantially all final decisions made by a city, county, special district, or state agency, regarding land use, zoning, or comprehensive planning. *Id.* § 3.

150. Graham v. Estuary Properties, Inc., No. 58,485 (Fla., set for oral argument May 2, 1980).

the landowner.[151] Further, use of the shifting-burden-of-proof approach could run afoul of the general rule in Florida "that as in court proceedings, the burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal."[152]

Once it has been recognized that local powers to regulate land use are delegated from the state, as was done in *Cross Key Waterways,* it is incumbent upon the courts to require that the legislative guidelines for the exercise of that power be met. Otherwise, the legislative purpose is thwarted. A judicial adoption of the *Fasano* approach would be an appropriate response by the judiciary to the design of the legislative delegation of local land use regulation. If the judiciary does not adopt this approach, the legislature should do so in order to preserve the benefits of the legislative guidelines on local decisionmaking.

The Florida Supreme Court has already stated that a reviewing court may overturn the decision of the local land use authority when that decision is not supported by competent substantial evidence in the record.[153] The scope of such review is still limited to the traditional test of whether sufficient competent evidence is available to make the decision of the local authority fairly debatable.[154] With adoption of the *Fasano* approach, the review of local quasi-judicial land use decisions would require determination of whether there was competent substantial evidence on the record to show that the action taken furthers the statutory standards con-

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151. *See* text accompanying notes 71 & 72 *supra.*

152. Balino v. Department of Health & Rehabilitative Servs., 348 So. 2d 349, 350 (Fla. 1st Dist. Ct. App. 1977).

153. Skaggs-Albertson's v. ABC Liquors, Inc., 363 So. 2d 1082 (Fla. 1978). The term "competent substantial evidence" when used in relation to review by certiorari of an administrative order was explained in De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957) as follows:

> We have used the term "competent substantial evidence" advisedly. Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. . . . In employing the adjective "competent" to modify the word "substantial," we are aware of the familiar rule that in administrative proceedings the formalities in the introduction of testimony common to the courts of justice are not strictly employed. . . . We are of the view, however, that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent the "substantial" evidence should also be "competent." (citations omitted).

154. *See* Bell v. City of Sarasota, 371 So. 2d 525 (Fla. 2d Dist. Ct. App. 1979).

tained in the delegation of authority to take such an action.

One further step is needed—recognition that even those actions characterized as "legislative" under *Fasano* are actually made pursuant to authority delegated from the state, just as much as the quasi-judicial actions are. Thus, the characterization of these supposedly legislative actions as "quasi-legislative" would be more accurate.[155] The important result of this characterization is that for judicial review of quasi-legislative actions,[156] as well as of quasi-judicial actions, the test for validity of the actions would be whether the legislative standards or guidelines were complied with.[157] This is a more exacting standard than the "arbitrary and capricious" test.

When the proper test for validity of the action has not been satisfied, the reviewing court must order a proper remedy (regardless of which test the court has applied). The first question which must be addressed as to remedy is whether the landowner may receive monetary compensation or must be content with invalidation of the local action. The general rule in Florida has been that:

> [The] enactment of a zoning ordinance under the exercise of police power does not entitle the property owner to seek compensation for the taking of the property through inverse condemnation. . . . If the zoning ordinance as applied to the property involved is arbitrary, unreasonable, discriminatory or confiscatory . . ., the relief available to the property owner is a judicial determination that the ordinance is either invalid, or unenforceable as pertains to plaintiff's property.[158]

The United States Supreme Court has decided no case on point, but the rule that a landowner may not receive monetary compensation, as stated above, is supported by the weight of authority.[159]

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155. The power to promulgate regulations to effect a general public purpose under a statute is quasi-legislative. Daniel v. Florida State Turnpike Auth., 213 So. 2d 585, 586 (Fla. 1968).

156. Those characterized as legislative in text accompanying notes 39 & 40 *supra*.

157. *See* Lee v. Delmar, 66 So. 2d 252, 255 (Fla. 1953) ("The power of the [agency] is limited to the yardstick laid down by the Legislature. . . .").

158. Mailman Dev. Corp. v. City of Hollywood, 286 So. 2d 614, 615 (Fla. 4th Dist. Ct. App.), *cert. denied*, 293 So. 2d 717 (Fla.), *cert. denied*, 419 U.S. 844 (1974) (citation omitted).

159. *E.g.*, Agins v. City of Tiburon, 157 Cal. Rptr. 372 (1979), *aff'd on other grounds*, [1980] U.S.L.W. 4700 (June 10, 1980); Eck v. City of Bismarck, 283 N.W.2d 193 (N.D. 1979); Fred F. French Investing Co. v. City of New York, 350 N.E.2d 381 (N.Y.), *appeal dismissed*, 429 U.S. 990 (1976).

Once there is a judicial determination that a local zoning action is invalid, several remedies are available to the court, including the following: (1) leave the area unzoned, (2) allow the landowner to develop in a way determined appropriate by the court, (3) allow the landowner to develop according to his proposed use, (4) remand to the local zoning authority to adopt a proper decision within a set time, or (5) remand for a determination by the local authority of the proper use of the property.[160] Of these, the fourth alternative presents the best opportunity for the local authority to use its expertise to balance interests in arriving at a result more equitable than "one land use extreme or the other."[161]

In *Estuary Properties,* the Florida First District Court of Appeal remanded to the Adjudicatory Commission to grant the corporate landowner permission to develop without hindrance.[162] The order was to terminate only if Lee County instituted condemnation proceedings in the circuit court within thirty days of the court's entry of judgment.[163] This holding fits alternative (3), above—it allows the landowner to develop according to his proposed use. That remedy has the disadvantage of allowing the landowner to develop his property exactly as he wishes, without consideration for other equitable uses of the property which might have less potential negative impact on the overall plan for development of surrounding areas.[164] The court did hold that the county could institute condemnation proceedings against the property, if it wished, rather than allowing the property to be developed according to the landowner's wishes.[165] This is not very helpful, however, since counties have the power to take property by eminent domain anyway.[166]

There is one final statutory remedy available to the landowner in certain situations in Florida. If the landowner believes that an action by a state agency pursuant to any of several enumerated statutes, including the development of regional impact process, has "taken" his property without due process, he may institute an action in circuit court.[167] If the circuit court agrees, it must remand the issue "to the agency which shall, within a reasonable time: (a)

160. Ed Zaagman, Inc. v. City of Kentwood, 277 N.W.2d 475, 482-83 (Mich. 1979).
161. *Id.* at 488.
162. 381 So. 2d at 1140-41.
163. *Id.*
164. Ed Zaagman, Inc. v. City of Kentwood, 277 N.W.2d 475, 486-88 (Mich. 1979).
165. *See* 381 So. 2d at 1140-41.
166. FLA. STAT. § 127.01 (1979).
167. *Id.* § 380.085(2).

Agree to issue the permit; (b) Agree to pay appropriate monetary damages; . . . or (c) Agree to modify its decision to avoid an unreasonable exercise of police power."[168] The agency, and not the court, selects the option for a given circumstance,[169] and the remedy is thus like alternative (4), above—it requires remand to the local zoning authority to adopt a proper decision within a set time. This remedy was not sought in the *Estuary Properties* case.

The Florida Supreme Court should take advantage of the opportunity presented by a case like *Estuary Properties* and adopt the modern *Fasano* approach to judicial review of quasi-judicial decisions in the context of land use control. The court should also apply the *Fasano* requirements to quasi-legislative actions. If the court does not take this action, the legislature should do so in order to give new life to the statutory guidelines on local land use regulation. A final alternative available to the legislature, besides statutory adoption of the *Fasano* requirements is to define local governments for purposes of local land use as "agencies" within the Administrative Procedure Act (APA).[170] That would result in practically the same procedural and substantive safeguards since local governments would thereby be required to show by competent substantial evidence that the statutory guidelines are met in individual actions.[171]

In fact, the necessity of making the sometimes subtle distinction between quasi-judicial and quasi-legislative administrative action has already been eliminated under the APA.[172] The only disadvantage of defining local governments as agencies within the APA for purposes of local land use would be that judicial review would then take place in the district courts of appeal rather than the circuit courts, increasing the caseload of the appeal courts.[173] Of course,

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168. *Id.* § 380.085(3).

169. *See* Rhodes, *Compensating Police Power Takings: Chapt. 78-85, Laws of Florida*, 6 FLA. ENVT'L & URB. ISSUES 1 (1978).

170. "Agency" for purposes of the Administrative Procedure Act is defined in FLA. STAT. § 120.52(1) (1979). *See* Sweetwater Utility Corp. v. Hillsborough County, 314 So. 2d 194 (Fla. 2d Dist. Ct. App. 1975); [1975] Fla. Att'y Gen. Ann. Rep. 075-140 (May 16, 1975); and L. DAVIDSON, *supra* note 136, at § 5.03 for the proposition that the Administrative Procedure Act is not applicable to zoning. One commentator believes that adoption of state administrative procedure acts and application of them to zoning is likely to develop into a trend in the future. Sullivan, *supra* note 71, at 78.

171. Administrative actions must be consistent with the statutes under which they are taken. DeThorne v. Beck, 280 So. 2d 448, 449 (Fla. 4th Dist. Ct. App. 1973).

172. *See* School Bd. v. Mitchell, 346 So. 2d 562 (Fla. 1st Dist. Ct. App. 1977); State *ex rel.* Dep't of General Servs. v. Willis, 344 So. 2d 580 (Fla. 1st Dist. Ct. App. 1977).

173. *See* Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc., 361 So. 2d 695

the caseload in the circuit courts would be correspondingly reduced. An exception to review in the court of appeal would be a direct attack on the constitutionality of a statute or rule or regulation, in which event jurisdiction lies in the circuit courts.[174] The advantages of defining local governments as agencies would include increased uniformity of treatment of administrative actions by both state agencies and local governments acting under authority delegated from the state, and the demise of the sometimes difficult distinction between quasi-judicial and quasi-legislative actions in the context of local land use regulation.

Whether the *Fasano* requirements are adopted with or without modification of appellate review jurisdiction, or whether the requirements are effectively adopted by making local governments "agencies" within the Administrative Procedure Act for purposes of land use regulation, the condition that local governments further the guidelines contained in their grants of authority to regulate land use should be imposed.

(Fla. 1978); Carrollwood State Bank v. Lewis, 362 So. 2d 110 (Fla. 1st Dist. Ct. App. 1978).

174. Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc., 361 So. 2d 695 (Fla. 1978); Carrollwood State Bank v. Lewis, 362 So. 2d 110 (Fla. 1st Dist. Ct. App. 1978).